Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

THEODORE L. SCHMIDT,

Petitioner,

v.

UNITED STATES OF AMERICA, PAUL O'NEIL, SECRETARY OF THE TREASURY, UNITED STATES DEPARTMENT OF THE TREASURY, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Did the Third Circuit Court of Appeals' summary affirmance of the district court's granting of judgment on the pleadings err in not considering whether the complaint demonstrated a miscarriage of justice and, therefore, presents an important question of federal law which must be settled by this Honorable Court?

II. Did the Third Circuit Court of Appeals' order granting the appellee's, motion for summary affirmance sanction the district court's departure from the accepted and usual course of judicial proceedings in denying appellant leave to amend his complaint in light of the enhanced pleading requirements imposed upon such pleadings by *Palma v. United states*, 228 F.3d 323 (3d Cir. 2000)?

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1. *Schmidt v. USA*, CV 00-906 (MDPA, dated September 5, 2000) (ordering Case Management Conference).

2. *Theodore L. Schmidt v. United States Of America, Paul O'Neil, Secretary Of The Treasury, United States Department Of The Treasury, Bureau Of Alcohol, Tobacco And Firearms* (MDPA-CV-3:00-0906, dated May 4, 2001).

3. *Schmidt v. USA*, No. 01-2393 (3d Cir. dated August 6, 2001). (granting motion to suspend briefing).

4. *Schmidt v. USA*, No. 01-2393 (3d Cir. dated January 8, 2002). (granting motion to suspend briefing).

5. *Theodore L. Schmidt v. United States Of America, et al.* (MDPA _ Scranton D.C. NO. 00-CV-00906 (EMK)), No. 01-2393 (3d Cir. Dated May 21, 2002).

6. *Theodore L. Schmidt v. United States Of America, et al.* (MDPA _ Scranton D.C. NO. 00-CV-00906 (EMK)), No. 01-2393 (3d Cir. Dated July 12, 2002).

STATEMENT OF JURISDICTION

This is an appeal from a final Order of the United States Court of Appeals for the Third Circuit dated May 21, 2002. District Court for the Middle District of Pennsylvania entered May 4, 2001, granting a Motion for Summary Affirmance by the Appellees. The United States Supreme Court has jurisdiction over the instant appeal pursuant to 28 U.S.C. § 1254.

TABLE OF STATUTES

The text of the following statutes are set out in the appendix in Appendix D.

The Gun Control Act of 1968,
18 U.S.C. §§ 921-930, *as amended*

18 U.S.C. § 921(a)(20)(B)

18 U.S.C. § 921(a)(33)(A)

18 U.S.C. § 922(g)(9)

18 U.S.C. § 925(c)

STATEMENT OF THE CASE

Procedural History

This is a case in which a citizen upon whom a disability has been imposed pursuant to the Gun Control Act of 1968 by reason of a disqualifying conviction sought administrative relief from disability as provided for in that statute. Due to funding prohibitions placed upon the United States by Congress, however, the United States refused to act in that administrative proceeding.

In accordance with the Third Circuit Court's prior decision in *Rice v. Department of Alcohol, Tobacco and Firearms*, 68 F.3d 702 (3d Cir. 1995), Schmidt sought the opportunity to demonstrate his entitlement to relief from disability through establishing that he met all of the statutory criteria in the Act. This was done through the filing of a complaint which conformed to the notice pleading requirements of Fed. R. Civ. P. 8(a)(2); *Conley v. Gibson*,

355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1955). The complaint was filed with the United States District Court for the Middle District of Pennsylvania which had subject matter jurisdiction over Appellants' claim pursuant to 18 U.S.C. § 925(c); *Rice v. Department of Alcohol, Tobacco and Firearms*.

In response to this Complaint, the United States filed an Answer, denying several of the allegations of the Complaint, and concurrently, sought Judgment on the Pleadings. After the initial briefs on this issue were filed, this Court held that in order to entertain proceedings under *Rice*, the Complaint must allege facts which would establish a miscarriage of justice independent of compliance with the statutory requirements of the Act for relief from disability. *Palma v. United States*, 228 F.3d 323 (3d Cir. 2000)

Because of the impact that this Court's decision in *Palma* had upon this matter in the District Court, the United States filed a supplemental brief. Schmidt replied, requesting leave to amend his Complaint should it be determined that the demands of *Rice* and *Palma* require pleading more specific that that of Fed. R. Civ. P. 8(2).

By Order of May 4, 2001, the District Court granted the United States Judgment on the Pleadings, and denied Schmidt leave to amend his Complaint. Schmidt filed an appeal of the District Court's Order to the United States Court of Appeals for the Third Circuit, which had jurisdiction over the appeal from the District Court Order pursuant to 28 U.S.C. § 1291. In response the United States filed a Motion for Summary Affirmance.

On May 21, 2002, the Third Circuit Court issued an order granting the Appellee's Motion for Summary Affirmance in light of its decision in *Pontarelli v. United States Department Of The Treasury, Bureau Of Alcohol, Tobacco And Firearms*, 285 F.3d 216 (3d Cir. 2002). This appeal followed.

Factual History

The Gun Control Act of 1968[1] has always prohibited those convicted of felony crimes from possessing a firearm or ammunition, but has always exempted from its scope persons employed by federal, state and local governments required to do so as a function of their employment. 18 U.S.C. §§ 922(g), 925(a). A felony, as described by the Act, is that which is not classified as a misdemeanor under state law and punishable by a term of imprisonment of two (2) years or less. 18 U.S.C. § 921(a)(20)(B).

The disability imposed upon individuals with disqualifying convictions was not absolute, however. Within the provisions of the Act, Congress provided for a mechanism by which an individual may seek relief from prohibition under 18 U.S.C. § 925(c). This Section provides:

> (c) A person who is prohibited from possessing, shipping, transporting, or receiving firearms or ammunition may make application to the Secretary [of the Treasury] for relief from the disabilities imposed by Federal laws with respect to the acquisition, receipt, transfer, shipment, transportation, or possession of firearms, and the Secretary may grant such relief if it is established

1. 18 U.S.C. §§ 921-930, *as amended.*

> to his satisfaction that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest. Any person whose application for relief from disabilities is denied by the Secretary may file a petition with the United States District Court for the district in which he resides for a judicial review of such denial. The court may in its discretion admit additional evidence where failure to do so would result in a miscarriage of justice. . . .

18 U.S.C. § 925(c). In order to carry out the statutory mandate of this Section, the Secretary of the Treasury has delegated his authority to the Bureau of Alcohol, Tobacco and Firearms (BATF), which has set up an administrative process for the adjudication of relief requests. 27 C.F.R. § 178.144.

Despite a rather detailed administrative process, however, the BATF has not processed a single application for relief filed pursuant to 18 U.S.C. § 925 (c) and its own regulations since 1993. For each year since 1993, Congress has, on an annual basis in appropriation bills, specifically prohibited the use of appropriated funds to investigate or act upon applications from relief.

Nevertheless, Congress has not acted to either modify or repeal the provisions of 18 U.S.C. § 925(c). There is evidence to suggest that Congress could have done so had it so chosen.

In 1996, the Act was amended to additionally prohibit those convicted of "a misdemeanor crime of domestic violence". 18 U.S.C. § 921(a)(33)(A). Under the amendments to the Act, a person convicted of a "misdemeanor crime of domestic violence" may not "possess in or affecting commerce, any firearm or ammunition". 18 U.S.C. § 922(g)(9). In addition, the 1996 amendments modified the governmental exemption contained in 18 U.S.C. § 925(a) to exclude from its scope those convicted of misdemeanor crimes of domestic violence. 18 U.S.C. § 925(a)(1). The United States has applied these amendments retroactively.

One of the individuals affected by the retroactive application of the amendments was the Appellant, a Scranton Police Officer since November 30, 1990. Prior to becoming certified as a police officer, Schmidt was required to undergo police training in accordance with the Municipal Police Officers Training and Education Act, 53 Pa. C.S. § 2161-2164. He did so at the Pennsylvania State Police Academy - Wyoming, receiving the highest academic grade in the 1990 class.

Upon certification as a police officer, Schmidt was assigned as a Patrolman to the Patrol Division of the Scranton Police Department. He served in the Patrol Division from 1991 until 1995, when he was certified as an accident reconstructionist and assigned to the Highway Unit of the Scranton Police Department.

Throughout his service as a police officer, Schmidt performed his duties as a Scranton Police officer in a satisfactory manner, earning at least one commendation for duty bravery issued by the Scranton Police Department. However, in 1996, he became involved in an altercation with the person with whom he was co-habitating, Rose Maxwell,

which resulted in his arrest. On September 6, 1996, prior to the effective date of the amendments to the Act, Schmidt pleaded guilty to a criminal charge of Simple Assault - Mutual Combatants, which is graded as a Misdemeanor 3 under the Pennsylvania Crimes Code. On September 9, 1996, Schmidt was sentenced to one (1) year probation.

When the Amendments to the Act became effective and the United States indicated that enforcement was retroactive, Schmidt was relieved of his duty weapon, and assigned to office duties in the Highway unit of the Scranton Police Department. Since that period of time, his duties have been limited to accident investigations and clerical duties by the Scranton Police Chief. He has performed these limited duties since that time.

On November 30, 1999, Schmidt made application to the Secretary of the Treasury, via form ATF F 3210.1 (2-99) seeking relief from disability as set forth in 18 U.S.C. § 925(c). The BATF, however, did not take any action to investigate or process the application because of the prohibition on doing so imposed by annual appropriation measures.

After waiting seven months for the BATF to process his application, Schmidt filed his action in the District Court, alleging all of the forgoing as well as that he met all of the statutory requirements for relief from disability set forth in the Act, and but for the failure of the BATF to investigate and process his application, he would be entitled to relief from disability.

REASONS FOR GRANTING THE WRIT

I.

WHERE A COMPLAINT SETS FORTH FACTUAL CONTENTIONS MATERIAL TO THE ISSUE OF JUDGMENT WHICH ARE CONTROVERTED BY THE ANSWER, THE EXISTENCE OF THOSE ISSUES OF MATERIAL FACT PRECLUDE THE ENTRY OF JUDGMENT ON THE PLEADINGS.

The District Court granted the United States judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c). Under Rule 12 (c), the District Court could not have properly granted judgment on the pleadings unless the United States "clearly establishes that no material issue of fact remains to be resolved and that he is entitled to judgment as a matter of law". *Kruzits v. Okuma Machine Tool, Inc.*, 40 F.3d 52, 54 (3d Cir. 1994). In considering such a motion, the District Court was bound to accept all of the factual averments of the Complaint as true, view all facts in a light most favorable to the Appellant, and reject as false all contraverted assertions of the United States. *DeFiore v. Vignola*, 823 F. Supp. 315 (E.D. Pa. 1993).

The case was appealed to the Third Circuit Court of Appeals which made no ruling on whether or not the District Court improperly granted judgment, but issued a Summary Affirmance based on its recent decision in *Pontarelli v. United States Department Of The Treasury, Bureau Of Alcohol, Tobacco And Firearms*, 285 F.3d 216 (3d. Cir. 2002). The Third Circuit held in *Pontarelli* that the Congressional appropriations ban renders the BATF unable to deny an application for removal of a disability pursuant to 18 U.S.C.

§ 925(c) and therefore the District Courts lack subject matter jurisdiction to review those applications. The decision also indicated that the Court was, therefore, overruling its decision in *Rice v. Department of Alcohol, Tobacco and Firearms*, 68 F.3d 702 (3d Cir. 1995).

It is Appellant's position, however, that *Rice* should remain controlling. Congress has not repealed Section 925, and still allows individuals seeking relief from a firearm disability to petition the Secretary for relief from disability pursuant to Section 925. The Legislative History the Court relies upon in *Pontarelli* does not establish that Congress intended to repeal Section 925, but merely shows the political compromises being made between members of the legislature. Congress could have enacted legislation, such as the Stop Arming Felons Act, but failed to do so. It could have amended the provisions of Section § 925 to remove petitioning mechanism. The provisions, however, have remained unaltered. Consequently, the result has been to burden the Courts with the conflict between a statutory right and a failure to fund that mechanism. Congress has also saddled the Courts with the burden of essentially "repealing" Section 925. Whereas the Legislature should not be able to resolve its political conflicts by simply failing to meet funding obligations and deprive citizens of their statutory rights, the third Circuit's decision in *Pontarelli* should be overruled and the holding in *Rice* adopted.

In *Rice*, the Third Circuit Court had held that the Appropriation Acts prohibiting the expenditure of funds by the BATF for the investigation of relief applications did not demonstrate a clear intent to repeal Section 925(c) of the Act or preclude judicial review of the BATF's refusal to grant relief from firearms disabilities. 68 F.3d at 707. The Court

held further that because the BATF is prohibited from processing such applications indefinitely, the administrative remedy offered by the BATF is so inadequate as to warrant excusing the failure to exhaust administrative remedies. 68 F.3d at 709. In doing so, the Court relied on that portion of Section 925(c) which permits the District Court to receive independent evidence when necessary to avoid a miscarriage of justice. *Id.* Based upon the foregoing, the controlling standard on the District Court was whether Schmidt "***alleged facts which indicate a potential for a miscarriage of justice***". 68 F.3d at 710.

The "potential" referred to is the potential for a miscarriage of justice which could result from the failure to admit additional evidence. *Palma v. United States*, 48 F. Supp. 2d 481, 486 (E.D. Pa. 1999) (emphasis added). This view of the "miscarriage of justice" standard was reiterated by the District Court in the prior decision in *Pontarelli v. United States Department of the Treasury*, 2000 U.S. Dist. Lexis 2702 (E.D. Pa. 2000):

> ***The Court finds that there exists the potential for a miscarriage of justice were, as here, Plaintiff meets the statutory requirements for such relief but due to a lack of Congressional funding, such relief is not available.***

2000 U.S. Dist. LEXIS 2702 at 4. (Emphasis added). However, the Third Circuit Court subsequently held that the mere meeting of statutory requirements without adequate remedy is not a *per se* miscarriage of justice. *Palma v. United States*, 228 F.3d 323 (3d Cir. 2000).

In *Palma*, the Court specifically reaffirmed its earlier decision in *Rice*, that Petitions for relief must be judged on whether the Petition has "***alleged facts which indicate a potential for a miscarriage of justice***". 228 F.3d at 325. The "potential" referred to is the potential for a miscarriage of justice, which could result from the failure to admit additional evidence. *Id.*

In *Palma*, the District Court had held that the threshold showing to be made for the District Court to accept additional evidence was the potential for a miscarriage of justice. 48 F. Supp. 2d at 486. This threshold showing, consistent with the standard enunciated in *Rice*, was not disturbed on appeal. 228 F.2d at 323. Rather, it was the District Court's further holding that a Plaintiff who pleads that he is entitled to relief under the Act, but cannot obtain that relief because of the inability of the BATF makes out a *per se* miscarriage of justice with which this Court disagreed. *Id.*

Under the standard announced in *Rice*, and clarified in *Palma*, the District Court erred in granting judgment on the pleadings where the Complaint, when taken as a whole and viewed in a light most favorable to the Appellant, establishes the potential for a miscarriage of justice and the parties disagree as to material facts alleged. *CoreStates Bank, N.A. v. Huls America, Inc.*, 176 F.3d 187 (3d Cir. 1999).

The following *facts* were alleged in the Complaint:

- Schmidt has been a sworn Scranton City Police Officer for almost ten (10) years.

- As a police officer he had to attend both the State Police Academy, where he graduated with

the highest grade in his class, and annual updates, which include extensive firearms training in accordance with the requirements of the Municipal Police Officers Training and Education Act, 53 Pa.C.S. § 2161-2164 (Act 120).

- As a police officer, Schmidt has held both general patrol and specialized assignments, and has performed his duties as a police officer in a satisfactory manner, including earning a citation for bravery.

- The legal disability applied to Schmidt was retroactive. As of the time Schmidt pleaded guilty to a misdemeanor crime of domestic violence, the Gun Control Act did not prohibit his possessing a firearm. It was only after the amendments to the Act were passed, and it determined to be of retroactive application by the Government, that Schmidt was relieved of his duty weapon, and assigned to office duties in the Highway unit of the Scranton Police Department. Since then, his duties have been limited to accident investigations and clerical duties because of the policy of the Scranton Police Department.

- Schmidt seeks relief from disability in order to perform his duties as a police officer.

- Because he is a police officer without record of misconduct, trained and entrusted to protect the public, Schmidt would not be likely to act in a manner dangerous to public safety.

- Based upon his record, Schmidt would not be likely to act in a manner dangerous to public safety. The circumstances under which the disability arose were *isolated* and involved mutual engagement as recognized by the Court in its acceptance of the plea and sentence. Officer Schmidt completed the probation sentence and was fully discharged.

- Schmidt holds the highest reputation within both the community and the police department and based on this reputation, would not be likely to act in a manner dangerous to public safety.

- Granting the relief would not be contrary to the public interest.

Unlike the applicant in *Rice*, whom the Third Circuit Court had held was entitled to present additional evidence, the Appellant denied this same opportunity is a trained police officer sworn to uphold the law, extensively trained in the use, care and dangers of firearms. Unlike the applicant in *Rice*, the Appellant seeks the restoration of privileges in order to serve the community, rather than simply to hunt, target shoot, collect or protect himself. The Appellant's single misdemeanor conviction, unlike that of the applicant in *Rice*, was not that of felony grade, did not involve firearms, and was not in and of itself a violation of the Act.

As mandated by both *Rice* and *Palma*, the four corners of the Complaint establish the potential for a miscarriage of justice if the Court were not to allow additional evidence as to Schmidt's entitlement to relief from disability. It is

respectfully submitted that the legislative provision for relief from disability was crafted with an individual like Schmidt in mind — a trained career police officer who, due to a single, isolated incident of mutual combat in a domestic situation which he took full responsibility for, is faced with a lifetime disability. The pleadings present a police officer that has the highest reputation, no blemishes on his record, and is not likely to be a threat to the community. The pleadings also present a police officer that cannot perform the full range of police duties and act in the best public interest because he cannot possess a firearm. Based upon these factors, it cannot be seen how denying Schmidt the mere *opportunity* to present evidence would *not* create the potential for a miscarriage of justice.

II.

THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING THE APPELLANT LEAVE TO AMEND HIS COMPLAINT TO SET FORTH MORE SPECIFIC FACTS TO ESTABLISH A MISCARRIAGE OF JUSTICE.

At the time Plaintiff filed his complaint, the only authority within the Third Circuit addressing these types of proceedings was the Third Circuit Court's holding in *Rice*, and the District Court holdings in Palma and *Pontarelli*. Both of these District Court decisions maintained that meeting the statutory elements necessary for relief from disability coupled with the breakdown in the administrative system occasioned by the failure of the BATF to process applications constituted a miscarriage of justice under *Rice*. In fact before the District Court, the Appellant relied heavily on two factors in addressing the motion for judgment on the pleadings: (1) the District Court instruction in *Palma* and *Pontarelli*; and (2) the notice pleading requirements

embodied in the Federal Rules. Fed. R. Civ. P. 8(a)(2); *Conley v. Gibson*, 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1955). As noted by the district court:

> In his brief in response, plaintiff relies on two Eastern District of Pennsylvania cases, *Palma v. United States*, 48 F. Supp. 2d 481 (E.D.Pa. 1999), and *Pontarelli v. United States Dept. of Treasury*, 1999 WL 715167 (E.D.Pa. 1999), which held that the "potential miscarriage ~~of~~ justice" threshold was met upon a showing that (1) the plaintiff meets the statutory requirement for such relief and (2) there is no way for the plaintiff to obtain the relief, due to the lack of Congressional funding. However, since plaintiff filed his opposition brief, the Third Circuit Court of Appeals reviewed the decision in *Palma*, and reversed.

(Memorandum Opinion at 5).

In light of the clarification offered in *Palma* as to the level of factual detail necessary to establish a miscarriage of justice, the Appellant requested leave of the Court to amend to set forth more specific facts to meet this standard. The Court denied this request stating:

> *Palma* simply requires the complaint to contain factual averments sufficient to find a "miscarriage of justice." As discussed above, plaintiff has simply failed to do so. Thus, plaintiff's motion for leave to amend his complaint will be denied.

(Memorandum Opinion at 7). Appellant contends that this denial was a reversible abuse of discretion.

Leave to amend a pleading "shall be freely given when justice so requires". Fed. R. Civ. P. 15(a). While the grant or denial of an opportunity to amend is within the discretion of the District Court, the refusal to grant such a request without sufficient justification is inconsistent with the spirit of the Federal Rules and is an abuse of that discretion. *Foman v. Davis*, 371, U.S. 178, 182, 83 S. Ct. 227, 230, 9 L. Ed. 2d 111, 125 (1962). The District Court may justify the refusal of leave to amend based upon several factors, including undue delay, bad faith, dilatory motive, prejudice, or futility. *Massarsky v. General Motors Corp.*, 706 F.2d 111, 125 (3d Cir. 1983). Where, however, a jurisdictional defect may be properly cured by amendment through the pleading of additional facts without any of the above factors being found, the failure to permit amendment is considered to be an abuse of discretion. *Centifanti v. Nix*, 865 F.2d 1422, 1431 (3d Cir. 1989).

Here, the district court made ***no*** finding as to undue delay, prejudice, bad faith, dilatory motive prejudice or futility. Nor did it offer any reason was the refusal other than that Plaintiff's complaint did not set forth specific facts which would entitle him to present evidence under the revised requirements set forth in *Palma*. *See, e.g., In re: Burlington Coat Factory Securities Litigation*, 114 F.3d 1410 (3d Cir. 1997); *Teamsters Pension Trust Fund v. CBS Records*, 103 F.R.D. 83 (E.D. Pa. 1984).

Appellant explained the basis for requesting leave to amend, and indicated that additional facts indicating a miscarriage of justice could be pled specifically under the Palma standard which changed the standard previously employed by district courts in Pennsylvania prior to September, 2000. Accordingly, the district court's denial of

leave to amend was without any justification whatsoever. This is precisely the type of abuse of discretion envisioned by the Supreme Court in *Foman*.

Regardless, then of the propriety of the district court's construction of *Palma*, the District Court abused its discretion by denying the Appellant leave to amend his complaint to allege specific facts which would constitute a "miscarriage of justice" and permit him the opportunity to have his claim heard. Moreover, the Third Circuit Court sanctioned this abuse of the judicial process when it granted the Appellee's Motion for Summary Affirmance.

CONCLUSION

For the forgoing reasons, Appellant respectfully requests that this Honorable Court reverse the Third Circuit Court Order granting the Motion for Summary Affirmance and remand this matter for further proceedings.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED MAY 21, 2002

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

April 30, 2002
C-86

No. *01-2393*

THEODORE L. SCHMIDT, Appellant

v.

UNITED STATES OF AMERICA, et al.
(MDPA - Scranton D.C. NO. 00-cv-00906 (EMK))

Present: SCIRICA AMBRO and GREENBERG,
Circuit Judges

1) Motion by Appellees for Summary Affirmance in light of this Court's recent en banc ruling in *Pontarelli v. Bur Alcohol*, No. 00-1268

ORDER

The foregoing motion is granted.

By the Court,

s/ Thomas L. Ambro
Circuit Judge

Dated: May 21, 2002
KB/cc: STW, TMB

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED MARCH 29, 2002

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 00-1268

LOUIS A. PONTARELLI v. UNITED STATES DEPARTMENT OF THE TREASURY, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS; JOHN W. MAGAW, DIRECTOR, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS Bureau of Alcohol, Tobacco and Firearms; John W. Magaw, Appellants.

November 28, 2001, Argued
March 29, 2002, Filed

OPINION OF THE COURT

AMBRO, Circuit Judge.

The Bureau of Alcohol, Tobacco and Firearms ("ATF"), an arm of the United States Department of the Treasury, appeals the District Court's order restoring Louis A. Pontarelli's firearms privileges. ATF asks us to reconsider our holding in *Rice v. United States*, 68 F.3d 702, 706-07 (3d Cir. 1995), that district courts have jurisdiction under 18 U.S.C. § 925(c) to review convicted felons' applications for restoration of their firearms privileges when ATF, pursuant to Congress's mandate, is unable to do so.

Appendix B

Section 925(c) allows convicted felons to apply to ATF for restoration of their firearms privileges,[1] and gives district courts jurisdiction to review a "denial" by ATF of a felon's application. The statute provides in pertinent part:

> A person who is prohibited from possessing, shipping, transporting, or receiving firearms or ammunition may make application to the Secretary[2] for relief from the disabilities imposed by Federal laws with respect to the acquisition, receipt, transfer, shipment, transportation, or possession of firearms, and the Secretary may grant such relief if it is established to his satisfaction that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public

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1. Federal law prohibits persons convicted of a crime punishable by a prison sentence exceeding one year from possessing, shipping, transporting, or receiving firearms that have traveled in interstate commerce. 18 U.S.C. § 922(g)(1). Aside from § 925(c), a convicted felon can regain his firearms privileges if the jurisdiction in which he was convicted expunges his conviction, pardons him, or restores his civil rights. 18 U.S.C. § 921(a)(20).

2. "[T]he Secretary" means "the Secretary of the Treasury or his delegate." 18 U.S.C. § 921(a)(18). The Secretary of the Treasury has delegated his authority to grant relief under § 925(c) to the Director of ATF. 27 C.F.R. § 178.144(b), (d). For simplicity, we refer to the Director of ATF as "ATF," and, unless otherwise indicated by the text, we use "Secretary" and "ATF" interchangeably.

> interest. Any person whose application for relief from disabilities is denied by the Secretary may file a petition with the United States district court for the district in which he resides for a judicial review of such denial.

18 U.S.C. § 925(c) (emphases added). Since 1992, Congress has provided in each ATF appropriations bill that "none of the funds appropriated herein shall be available to investigate or act upon applications for relief from Federal firearms disabilities under 18 U.S.C. § 925(c)."[3] This appropriations ban prevents ATF from acting upon — and thus from denying — felons' § 925(c) applications.

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3. Treasury, Postal Service, and General Government Appropriations Act, 1993, Pub. L. No. 102-393, 106 Stat. 1729, 1732 (1992); Treasury, Postal Service, and General Government Appropriations Act, 1994, Pub. L. No. 103-123, 107 Stat. 1226, 1228 (1993); Treasury, Postal Service, and General Government Appropriations Act, 1995, Pub. L. No. 103-329, 108 Stat. 2382, 2385 (1994); Treasury, Postal Service, and General Government Appropriations Act, 1996, Pub. L. No. 104-52, 109 Stat. 468, 471 (1995); Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009, 3009-319 (1996); Treasury, Postal Service, and General Government Appropriations Act, 1998, Pub. L. No. 105-61, 111 Stat. 1272, 1277 (1997); Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681, 2681-485 (1998); Treasury, Postal Service, Executive Office of the President, and General Government Appropriations Act, 2000, Pub. L. No. 106-58, 113 Stat. 430, 434 (1999); Consolidated Appropriations Act, 2001, Pub. L. No. 106-554, 114 Stat. 2763, 2763A-129 (2000); Treasury and General Government Appropriations Act, 2002, Pub. L. No. 107-67, 115 Stat. 514, 519 (2001).

Rice was the first circuit court opinion to address whether the appropriations ban enables felons to seek the restoration of their firearms privileges in federal court despite ATF's inability to review their applications. Unanimous panels of six other courts of appeals subsequently rejected its conclusion that ATF's inability to act pursuant to the appropriations ban enables district courts to review applications *de novo*. *Mullis v. United States*, 230 F.3d 215, 221 (6th Cir. 2000); *McHugh v. Rubin*, 220 F.3d 53, 59-60 & n.5 (2d Cir. 2000); *Saccacio v. ATF*, 211 F.3d 102, 104 (4th Cir. 2000); *Owen v. Magaw*, 122 F.3d 1350, 1353-54 (10th Cir. 1997); *Burtch v. United States Dep't of Treasury*, 120 F.3d 1087, 1090 (9th Cir. 1997); *United States v. McGill*, 74 F.3d 64, 66-68 (5th Cir. 1996). But *see Bean v. ATF*, 253 F.3d 234, 239 (5th Cir. 2001), *reh'g en banc denied*, 273 F.3d 1105 (5th Cir. Aug. 21, 2001) (unpublished table decision), *cert. granted*, 122 S. Ct. 917 (Jan. 22, 2002) (No. 01-704).[4]

Bean notwithstanding, we conclude that because the appropriations ban suspends ATF's ability to issue the "denial" that § 925(c) makes a prerequisite, it effectively suspends that statute's jurisdictional grant. We therefore overrule *Rice* and hold that the District Court lacked subject matter jurisdiction to consider Pontarelli's application.

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4. *Bean* contradicted *McGill* but purported not to overrule it. We decline to follow *Bean* because, as we explain in more detail below, it ignored the texts of § 925(c) and the appropriations ban, departed from Supreme Court precedent on when an appropriations act can change a substantive statute, and distorted the legislative history of the appropriations ban.

Appendix B

I. Facts and Procedural History

Pontarelli pled guilty in 1991 to violating 18 U.S.C. § 666(a)(2) by making cash payments totaling over $1,000 to a public official in exchange for favorable treatment in the award of federally financed housing rehabilitation contracts.[5] He was sentenced to three years of probation, fined, and ordered to pay $4,000 in restitution and to perform two hundred hours of community service. In 1998, Pontarelli submitted a § 925(c) application to ATF for the restoration of his firearms privileges. The agency told him that the appropriations ban rendered it unable to consider his application.

Pontarelli sued in the District Court, claiming that *Rice* allowed it to consider his application despite ATF's inability to act. The Court held an evidentiary hearing to determine whether he satisfied § 925(c)'s criteria for relief. Only Pontarelli presented evidence at the hearing.[6] Based on

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5. Section 666(a)(2) prohibits bribing "an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more" if the organization, government, or agency receives over $10,000 in federal assistance in any one-year period.

6. Pontarelli testified that he wants to regain his firearms privileges because he fears for his safety when he inspects dwellings for code compliance and collects payments for his son's construction company, and because he worries about the safety of his home in Clifton Heights, Pennsylvania. He added that prior to his conviction

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that presentation, the Court ordered his firearms privileges restored. Pontarelli v. United States, Dep't of Treasury, 2000 U.S. Dist. LEXIS 2702, No. CIV.A.98-5081, 2000 WL 274002, at *1-3 (E.D. Pa. Mar. 2000). When ATF appealed, we voted after panel oral argument to hear the case *en banc* to reconsider *Rice*.

II. Jurisdiction and Standard of Review

We have jurisdiction under 28 U.S.C. § 1291 because ATF appeals the District Court's final judgment in Pontarelli's favor. We consider *de novo* whether the District Court had subject matter jurisdiction. *In re Phar-Mor, Inc. Sec. Litig.*, 172 F.3d 270, 273 (3d Cir. 1999).

III. *Rice*

In *Rice*, a convicted felon applied to ATF for the restoration of his firearms privileges. After ATF informed him that the appropriations ban prevented it from processing his application, *Rice* sought judicial review. *Rice*, 68 F.3d at 705-06. The District Court dismissed his suit, concluding that it lacked subject matter jurisdiction because ATF's

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he was an avid hunter and a member of a gun club. Pontarelli's wife and son, as well as a former Chief of Police of Clifton Heights (who had known him for sixteen years) and the then-current Chief of Police of Clifton Heights (who had known Pontarelli for twenty-seven years and was a member of the gun club to which he belonged before his conviction), also testified, stating that Pontarelli is not a violent person, does not abuse drugs or alcohol, and would not threaten any person or the community if his gun privileges were restored.

inability to act on his application was not a "denial" under § 925(c). *Rice v. ATF*, 850 F. Supp. 306, 308 (E.D. Pa. 1994) (citing *Moyer v. Secretary of the Treasury*, 830 F. Supp. 516, 518 (W.D. Mo. 1993)).

We reversed, holding that the District Court had jurisdiction because the appropriations ban did not convey a clear intent to repeal § 925(c) or to preclude judicial review of ATF's inability to restore felons' firearms privileges. *Rice*, 68 F.3d at 706-07. We acknowledged that under *Robertson v. Seattle Audubon Society*, 503 U.S. 429, 440, 118 L. Ed. 2d 73, 112 S. Ct. 1407 (1992), and *United States v. Dickerson*, 310 U.S. 554, 555, 84 L. Ed. 1356, 60 S. Ct. 1034 (1940), Congress can use an appropriations act to modify substantive law if the act clearly states its intention to do so.[7] We then analyzed in a single paragraph Congress's intent in enacting the appropriations ban. *Rice*, 68 F.3d at 707. Without considering its obvious relationship to § 925(c)'s "denial" provision, its legislative history, or the implications of allowing felons to go straight to federal court to regain their firearms privileges, we determined that the appropriations ban did not prevent district courts from reviewing ATF's inability to restore felons' firearms privileges. *Id.* We reasoned that the ban did not "expressly preclude" district courts from

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7. However, we did not cite *United States v. Will*, in which the Supreme Court held that "when Congress desires to suspend or repeal a statute in force, '[t]here can be no doubt that . . . it could accomplish its purpose by an amendment to an appropriation bill, or otherwise,' " and that whether an appropriations measure changes substantive law " 'depends on the intention of Congress as expressed in the statutes.' " 449 U.S. 200, 222, 66 L. Ed. 2d 392, 101 S. Ct. 471 (1980) (quoting *Dickerson*, 310 U.S. at 555, and *United States v. Mitchell*, 109 U.S. 146, 150, 27 L. Ed. 887, 3 S. Ct. 151 (1883)).

reviewing applications and that "more explicit language" was required to repeal either § 925(c)'s jurisdictional grant or the statute as a whole. *Id.*

Next we considered whether ATF's inability to process applications excused the ordinary requirement that a person aggrieved by an agency decision exhaust his administrative remedies before seeking judicial review. 68 F.3d at 708. Relying on *McCarthy v. Madigan*, 503 U.S. 140, 147, 117 L. Ed. 2d 291, 112 S. Ct. 1081 (1992) (stating that "an unreasonable or indefinite timeframe for administrative action" militates against requiring exhaustion), and *Coit Independence Joint Venture v. Federal Savings and Loan Insurance Corp.*, 489 U.S. 561, 586-87, 103 L. Ed. 2d 602, 109 S. Ct. 1361 (1989) (holding that "[t]he lack of a reasonable time limit in [an] administrative claims procedure rendered it inadequate" and thus excused exhaustion), we held that, because the annually reenacted appropriations ban caused an "indefinite delay" in ATF's processing of applications, a felon could seek judicial review without exhausting his administrative remedies. *Rice*, 68 F.3d at 708-10. Although we recognized that the decision on whether to grant relief from firearms disabilities involves ATF's discretion and expertise, we concluded that Congress did not intend to impose a rigid exhaustion requirement because § 925(c) gives district courts discretion to consider evidence outside the administrative record when necessary to avert a miscarriage of justice. 68 F.3d at 709.[8]

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8. In addition, in a portion of our opinion not directly relevant here, we instructed the District Court to determine on remand whether refusing to admit Rice's proffered evidence would result in a

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Appendix B

IV. The Near-Unanimous Rejection of *Rice*

Nearly every federal court to consider the issue after *Rice* rejected its conclusion that the appropriations ban allows felons to go directly to federal court to seek restoration of their firearms privileges.[9] In *McGill*, the first court of appeals opinion after *Rice* to address the issue, the Fifth Circuit stated its "doubt that the district court has original jurisdiction to consider an application to remove the Federal firearm disability," but avoided confronting the issue directly by holding that Congress intended the appropriations ban to suspend the relief provided by § 925(c). *McGill*, 74 F.3d at

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miscarriage of justice, and if so, whether his proffered evidence, combined with the other evidence before the Court, was sufficient to satisfy Rice's burden of demonstrating that he "will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest." 68 F.3d at 709-10 (quoting § 925(c)) (quotation marks omitted in original).

9. *Mullis*, 230 F.3d at 221; *McHugh*, 220 F.3d at 59-60 & n.5; *Saccacio*, 211 F.3d at 104; *Owen*, 122 F.3d at 1353-54; *Burtch*, 120 F.3d at 1090; *McGill*, 74 F.3d at 66-68; *United States v. Wiggins*, 50 F. Supp. 2d 512, 514-15 (E.D. Va. 1999); *Dreher v. ATF*, 943 F. Supp. 680, 684 (W.D. La. 1996); *see also United States v. Chavez*, 204 F.3d 1305, 1314 n.6 (11th Cir. 2000) (stating in dicta that the appropriations ban suspends the relief provided by § 925(c)) (citing *McGill*, 74 F.3d at 66-68); *Moyer*, 830 F. Supp. at 518-19 (holding, in a decision issued two years before Rice but not cited therein, that district courts lack jurisdiction to consider § 925(c) applications because the appropriations ban suspended § 925(c)'s relief provision). But *see Bean*, 253 F.3d at 239.

65-66.[10] The Court relied heavily on the legislative history of the appropriations ban, which indicated that Congress suspended § 925(c)'s operation to avoid wasting resources and risking harm to innocent citizens, not to saddle federal judges with the unfamiliar task of investigating felons' fitness to carry firearms. 74 F.3d at 66-67. Moreover, while the initial appropriations ban barred ATF from using funds to investigate any applications, in each subsequent year Congress provided funding to ATF to investigate corporations' (but not individuals') applications. This shift would not have been necessary to enable corporations to obtain relief if Congress intended for federal courts to consider felons' applications *de novo*. 74 F.3d at 67-68.

In contrast to *McGill*, the Ninth Circuit's decision in *Burtch* resolved the issue without examining the legislative history of the appropriations ban because § 925(c) "is clear on its face." *Burtch*, 120 F.3d at 1090. The Ninth Circuit held that the appropriations ban suspends § 925(c)'s jurisdictional grant because the latter makes a "denial" a jurisdictional prerequisite, and "[i]n the context of the entire statute, the word 'denial' means an adverse determination on the merits and does not include a refusal to act." *Id.* Similarly, the Fourth Circuit held in *Saccacio* that a district

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10. One year after the *McGill* decision, the United States District Court for the Western District of Louisiana addressed the jurisdiction issue in *Dreher*. Relying on the *McGill* panel's statement in dicta that Congress intended for district courts to have jurisdiction only over applications that ATF has denied, *McGill*, 74 F.3d at 66, Dreher held that, because the appropriations ban prevents ATF from processing applications, district courts lack original jurisdiction to review them. *Dreher*, 943 F. Supp. at 684.

court lacks subject matter jurisdiction to adjudicate a felon's application in the first instance because § 925(c) "authorizes judicial review of only the denial of an application for relief," and ATF's inability to act upon a felon's application is not " 'an adverse determination on the merits.' " *Saccacio*, 211 F.3d at 104 (quoting *Burtch*, 120 F.3d at 1090).[11]

The Tenth Circuit's decision in *Owen* held that the appropriations ban suspends § 925(c)'s jurisdictional grant. *Owen*, 122 F.3d at 1353. The Court rejected the argument that the ban "transferred the task of determining whether a felon's firearms privileges should be restored from [ATF] to the judiciary," emphasizing that § 925(c) allows only "the Secretary" to grant relief and permits judicial review only if the Secretary denies relief. 122 F.3d at 1353-54. Further, the Court found that the legislative history cited in *McGill* refuted the notion that Congress intended for federal courts to evaluate felons' applications in the first instance. 122 F.3d at 1354.

In *McHugh*, the Second Circuit held that district courts lack jurisdiction to evaluate § 925(c) applications that ATF has not reviewed.[12] *McHugh*, 220 F.3d at 59-60 & n.5.

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11. In *Wiggins*, which was decided the year before *Saccacio*, the United States District Court for the Eastern District of Virginia held that the appropriations ban suspended § 925(c)'s relief provision, leaving federal courts without jurisdiction to review felons' applications. *Wiggins*, 50 F. Supp. 2d at 514-15.

12. The applicant in McHugh was convicted of a "misdemeanor crime of domestic violence," which under § 922(g) has the same consequences for firearms privileges as a felony conviction. *McHugh*, 220 F.3d at 55.

The Court explained that, for several reasons, § 925(c)'s text makes it "abundantly clear that Congress intended to confine the initial adjudication of § 925(c) applications to the Secretary" and did not want courts evaluating applications in the first instance. 220 F.3d at 59. First, the statute "explicitly limits the scope of district court jurisdiction" to reviewing a "denial" by ATF of a felon's application. *Id.* Second, § 925(c) gives only "the Secretary" the authority to receive applications and grant relief; it does not "create a freestanding opportunity for relief" that district courts may grant pursuant to their jurisdiction over federal questions or commerce regulations. *Id.* Third, the statute's "standard for granting relief is worded so broadly as to connote administrative agency decisionmaking." *Id.* Fourth, § 925(c) prevents district courts from considering new evidence regarding an application unless failing to do so would produce a "miscarriage of justice," a constraint that indicates that only the Secretary may initially consider applications. *Id.*

The Second Circuit further noted that while § 925(c)'s text is clear, nothing in the appropriations ban's text or its legislative history suggests that Congress intended for the ban to "expand[ ] district court jurisdiction beyond the limits set forth in § 925(c)." 220 F.3d at 60. Instead, Congress expressed "pronounced skepticism about the ability of any adjudicative body to perform the task adequately and a desire to suspend the ability of individuals to have their firearms privileges restored." *Id.* To the extent that the appropriations ban precludes the "denial" that § 925(c) makes a jurisdictional prerequisite, it is " 'irreconcilable' with, and impl[ies] the suspension of, that portion of § 925(c) which authorizes

judicial review." 220 F.3d at 60 n.5 (quoting *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 190, 57 L. Ed. 2d 117, 98 S. Ct. 2279 (1978)).

Thus the crucial question was whether ATF's inability to act constituted a "denial" triggering federal-court jurisdiction. 220 F.3d at 60. The Second Circuit concluded that it did not because "the word 'denial' connotes more than a mere refusal to act." *Id.* (citations omitted). Moreover, even if ATF acted unlawfully by refusing to act, the appropriate remedy would be a court order compelling it to act pursuant to 5 U.S.C. § 706(1) (allowing a court to "compel agency action unlawfully withheld or unreasonably delayed"), not plenary judicial review of the felon's application. 220 F.3d at 61. Alternatively, if ATF's refusal to act constituted a "de facto denial" that conferred jurisdiction, a district court could reverse ATF's decision only if it were " 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,' " which complying with a congressional mandate surely is not. *Id.* (quoting 5 U.S.C. § 706(2)(A)) (citations omitted).

The Sixth Circuit held that the appropriations ban suspends § 925(c) in its entirety, thereby removing its jurisdictional grant. *Mullis*, 230 F.3d at 221. The Court reasoned that Congress chose to preclude the ATF "denial" that must precede federal jurisdiction under § 925(c). 230 F.3d at 219. Further, the limited scope of judicial review under 5 U.S.C. § 706 does not permit *de novo* review of § 925(c) applications, for the appropriations ban means that "there is no agency action for a federal court to compel or review." *Id.*

Practical considerations reinforced the Sixth Circuit's conclusion that Congress intended to suspend § 925(c)'s operation. *Id.* Unlike ATF, district courts are poorly equipped to conduct detailed investigations into felons' backgrounds and obtain information that they omitted from their applications, and adjudications based solely on the evidence presented by felons would be dangerously one-sided. 230 F.3d at 219-20. In addition, the legislative history showed that Congress enacted the appropriations ban to ensure that federal resources would not be devoted to restoring felons' firearms privileges. 230 F.3d at 220-21 & n.3.

While six circuit court opinions have rejected *Rice*, only one has agreed with it. Departing from the Fifth Circuit's ruling in *McGill*, the recent panel decision in Bean held that the appropriations ban does not suspend or repeal the rights embodied in § 925(c), and that district courts can consider § 925(c) applications when ATF is unable to do so.[13] *Bean*, 253 F.3d at 239. The panel insisted that it was focusing on Congress's intent, but it failed to address that § 925(c)'s text makes a "denial" a jurisdictional prerequisite. Though *Bean* refused to consider committee reports or statements by

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13. *Bean* did not reverse *McGill* because, as in the Third Circuit, one Fifth Circuit panel cannot reverse an earlier panel's decision. *FDIC v. Abraham*, 137 F.3d 264, 268 (5th Cir. 1998) (stating "the rule that one panel of this court cannot disregard, much less overrule, the decision of a prior panel"). Instead, *Bean* purported to distinguish *McGill* based on "the intervening passage of time." *Bean*, 253 F.3d at 234, 239. Despite the obvious conflict between *Bean* and *McGill*, the Fifth Circuit declined to rehear *Bean en banc*. As noted above, the Supreme Court recently granted ATF's petition for certiorari. *See* supra text accompanying note 4.

members of Congress, it relied heavily on the failure of a bill entitled the Stop Arming Felons Act ("the SAFE bill"), which was introduced in 1992, and which, inter alia, would have repealed § 925(c). 253 F.3d at 237-39. The SAFE bill's demise, the panel reasoned, illustrates that "[a]lthough it obviously has the power, Congress has not enacted legislation eliminating or amending § 925(c)." 253 F.3d at 238. However, *Bean* neglected to mention (as we explain below) that the SAFE bill is the ancestor of the appropriations ban, and that the latter is a temporary, compromise version of the former.

In addition to relying on Congress's decision not to pass the SAFE bill, *Bean* claimed that Congress lacks constitutional authority to suspend § 925(c)'s relief scheme by refusing to fund it. 253 F.3d at 239 (calling the notion that Congress could do so "inimical to our constitutional system of justice"). The panel insisted that the Supreme Court's decisions in Will and Dickerson — which held that Congress can use an appropriations act to suspend substantive law[14] — are distinguishable because those cases involved "purely financial rights that Congress then rescinded by expressly refusing to fund same." 253 F.3d at 239 n.19. Unlike a congressional refusal to fund statutorily required cost-of-living increases or military re-enlistment allowances, *Bean* reasoned, the appropriations ban is not "the requisite direct and definite

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14. Dickerson held that an appropriations bill that prohibited the use of funds to pay a statutorily required military re-enlistment allowance suspended the allowance for the fiscal year covered by that bill. 310 U.S. at 561. Will held that Congress intended to suspend statutorily required annual cost-of-living increases for federal judges when it passed appropriations bills banning the use of funds for those increases. 449 U.S. at 222-24.

suspension or repeal of" the statutory right at issue. 253 F.3d at 239. The panel failed to cite a single case supporting its novel conclusion that an appropriations act cannot change a substantive law unless the law involves "purely financial rights." Nor did it mention that the Supreme Court unanimously held in *Seattle Audubon*, 503 U.S. at 440, that a provision in an appropriations bill changed the requirements for complying with laws regulating timber harvesting, and that this provision had nothing to do with funding.[15] After determining that the appropriations ban did not affect § 925(c)'s relief provision, *Bean* concluded — without analyzing the issues of judicial review of agency inaction discussed in *McHugh* and *Mullis* — that district courts have jurisdiction to review § 925(c) applications because ATF's failure to act effectively exhausts applicants' administrative remedies.[16] *Bean*, 253 F.3d at 239 & n.20.

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15. While the provision at issue in *Seattle Audubon* did not pertain to the use or amount of appropriated funds, we know of no instance where the Supreme Court said that there is a distinction — let alone one of constitutional significance — between changing a substantive law by refusing to fund its implementation and doing so by including in an appropriations act legislation unrelated to funding.

16. The *Bean* panel repeatedly expressed sympathy for the felon whose application was at issue. For instance, it said that because the felon was a licensed firearms dealer prior to his conviction, it would be "inequit[able]" for him to be unable to resume his business while a corporation that sells firearms may seek relief under § 925(c). *Bean*, 253 F.3d at 238 n.9. However, the panel did not cite the Ninth Circuit's rejection in *Burtch* of a felon's contention that Congress violated the Equal Protection Clause by distinguishing between individual and corporate applicants. *Burtch*, 120 F.3d at 1090. Nor did it cite the Supreme Court's statement that "Congress could rationally conclude

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Appendix B

V. Discussion

Overwhelming authority suggests that *Rice* misunderstood Congress's intent in enacting the appropriations ban. The texts of § 925(c) and the appropriations ban, the legislative history of the latter, and district courts' inability to assess accurately which felons will misuse firearms confirm that Congress did not intend for felons to be able to apply directly to district courts for restoration of their firearms privileges.

A. The Texts of § 925(c) and the Appropriations Ban

The texts of § 925(c) and the appropriations ban demonstrate that district courts currently lack jurisdiction to consider felons' petitions for restoration of their firearms privileges. Section 925(c)'s jurisdictional grant provides: "Any person whose application for relief from disabilities is denied by the Secretary may file a petition with the United States district court for the district in which he resides for a judicial review of such denial." 18 U.S.C. § 925(c) (emphases added). This language unambiguously makes a "denial" a jurisdictional prerequisite. *McHugh*, 220 F.3d at 59; *Saccacio*,

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that any felony conviction, even an allegedly invalid one, is a sufficient basis on which to prohibit the possession of a firearm." *Lewis v. United States*, 445 U.S. 55, 66, 63 L. Ed. 2d 198, 100 S. Ct. 915 (1980). It appears that the *Bean* panel was frustrated that Congress left § 925(c) intact but barred individual felons from taking advantage of the statute's relief provision by (seemingly perpetually) continuing the appropriations ban. *See Bean*, 253 F.3d at 239 (claiming that *McGill* did not control in light of "the intervening passage of time and the resulting reality of the effective non-temporary 'suspension' of statutorily created rights").

211 F.3d at 104; *Burtch*, 120 F.3d at 1090. Because the Secretary of the Treasury has delegated his authority to ATF, *see supra* note 2, a district court may review a felon's application for restoration of his firearms privileges only if ATF first denies it. *Mullis*, 230 F.3d at 219; *McHugh*, 220 F.3d at 59; *Saccacio*, 211 F.3d at 104; *Owen*, 122 F.3d at 1354; *Burtch*, 120 F.3d at 1090.

The structure of § 925(c) supports this reading. The statute grants only "the Secretary" the authority to grant relief in the first instance. *McHugh*, 220 F.3d at 59; *Owen*, 122 F.3d at 1354. Further, he may grant relief "if it is established to his satisfaction that . . . the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest." 18 U.S.C. § 925(c) (emphases added). That Congress gave "the Secretary" broad discretion to apply such an amorphous standard suggests that it wanted an administrative agency, not district courts, to decide whether to restore felons' firearms privileges. *McHugh*, 220 F.3d at 59.

In addition, immediately after stating that a district court can review a "denial," § 925(c) provides that a court may "admit additional evidence where failure to do so would result in a miscarriage of justice." While *Rice* claimed that this provision decisively supports its conclusion as to exhaustion of administrative remedies,[17] closer examination

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17. "Were it not for the express authority section 925(c) gives district courts to receive independent evidence when necessary to avoid a miscarriage of justice, we would be hesitant to excuse exhaustion where, as here, Congress has entrusted a decision to an agency under standards including one so broad as ensuring the public interest." *Rice*, 68 F.3d at 709.

shows otherwise. To begin with, the "additional evidence" provision permits district courts only to supplement the record; it gives them no authority to create the record in the first place. As ATF points out, "that the district court may supplement the record does not change the fact that the court is expressly limited to conducting a 'judicial review' of ATF's 'denial' " to determine whether it was arbitrary and capricious. Appellant's Opening Br. at 18. Moreover, Congress would not have limited the admission of "additional" evidence to situations in which a "miscarriage of justice" would result if it intended for district courts to evaluate felons' applications *de novo*.[18] *McHugh*, 220 F.3d at 59.

Because § 925(c) unequivocally makes a "denial" by ATF a jurisdictional prerequisite, we must consider whether ATF's inability to act because of the appropriations ban constitutes a "denial."[19] We hold that it does not. "[T]he word 'denial'

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18. For this reason, *Rice* was wrong to view the "additional evidence" provision as supporting its conclusion with respect to exhaustion of administrative remedies. *Rice*, 68 F.3d at 708.

19. *Rice* did not consider whether plenary judicial review of a felon's application is consistent with § 925(c)'s text. Instead, it treated the statute's "denial" provision as "a judicially waivable exhaustion requirement, rather than a jurisdictional prerequisite." *Saccacio*, 211 F.3d at 105 n.2. In addition to erroneously viewing the issue in terms of exhaustion rather than jurisdiction, *Rice* misapplied the exhaustion doctrine. *Rice* relied upon *Coit Independence*, 489 U.S. at 586-87, for the proposition that an agency's "undue delay" excuses exhaustion. *Rice*, 68 F.3d at 708-09. However, *Coit Independence* involved a situation where neither Congress nor the agency itself had imposed a reasonable deadline for agency action.489 U.S.

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means an adverse determination on the merits." *Burtch*, 120 F.3d at 1090; *see also Saccacio*, 211 F.3d at 104 (same). In contrast, an inability to grant a request is not commonly understood to constitute a "denial." *See*, e.g., Webster's Third New International Dictionary 602 (3d ed. 1993) (defining a "denial" as a "refusal to grant, assent to, or sanction" or a "rejection of something requested, claimed, or felt to be due") (emphases added). Through the appropriations ban, Congress has rendered ATF unable to consider felons' § 925(c) applications. ATF's inability to grant the relief that felons seek does not constitute a "denial."[20]

Nor does the text of the appropriations ban create new jurisdiction for district courts to evaluate felons' § 925(c) applications absent a "denial." The appropriations ban provides: "[N]one of the funds appropriated herein shall be available to investigate or act upon applications for relief from Federal firearms disabilities under 18 U.S.C. § 925(c)."

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at 586-87. In contrast, when Congress passed the appropriations ban it expressly barred ATF from acting upon applications. ATF has no duty to act because Congress has prohibited it from acting; hence "[t]his is not [a] situation where an agency's proceedings have been tainted by unreasonable delay." *Wiggins*, 50 F. Supp. 2d at 516.

20. Although the appropriations ban expressly prohibits ATF from reviewing applications, some courts have imprecisely described ATF's inability to act as a "refusal" to do so. *See*, e.g., *McHugh*, 220 F.3d at 60; *Burtch*, 120 F.3d at 1090. The word "refusal" implies that a choice was made, and thus inaccurately suggests that ATF could have reviewed applications despite the appropriations ban.

Pub. L. No. 107-67, 115 Stat. at 519. Nothing in the ban's text suggests that Congress intended to confer new jurisdiction on district courts to restore felons' firearms privileges. *McHugh*, 220 F.3d at 60. Moreover, in 1993 Congress inserted a sentence immediately following the appropriations ban that restored funding for ATF to investigate corporations' applications. Pub. L. No. 103-123, 107 Stat. at 1228 ("[S]uch funds shall be available to investigate and act upon applications filed by corporations for relief from Federal firearms disabilities under 18 U.S.C. § 925(c)."). This sentence (and its inclusion in each subsequent ATF appropriations act) would be superfluous if Congress believed that the appropriations ban permitted district courts to grant relief despite ATF's inability to review applications. *McGill*, 74 F.3d at 67-68.

The texts of § 925(c) and the appropriations ban demonstrate convincingly that Congress did not intend for district courts to review individual felons' § 925(c) applications in the first instance.[21] Ordinarily we do not examine legislative history when the relevant statutory texts are clear. *Ross v. Hotel Employees and Restaurant Employees Intern. Union*, 266 F.3d 236, 245 (3d Cir. 2001). However, because we viewed the pertinent texts differently in *Rice*,

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21. Even if a district court had jurisdiction, it could reverse ATF's refusal to restore felons' firearms privileges only if ATF's decision not to act was arbitrary and capricious, *McHugh*, 220 F.3d at 61; *McGill*, 74 F.3d at 66; *Bagdonas v. Dep't of Treasury*, 93 F.3d 422, 425 (7th Cir. 1996); *Bradley v. ATF*, 736 F.2d 1238, 1240 (8th Cir. 1984), which following Congress's mandate is not.

and because the *Bean* panel made selective use of the legislative history of the appropriations ban, it is appropriate to examine that history.[22]

B. The Legislative History of the Appropriations Ban

The legislative history of the appropriations ban confirms that Congress did not intend for the appropriations ban to allow individual felons to go straight to district court to seek the restoration of their firearms privileges. As mentioned above, Congress first imposed the appropriations ban in 1992. In the reports to their respective chambers, the House and Senate Appropriations Committees explained why they were preventing ATF from acting on felons' § 925(c) applications. These reports indicate that Congress wanted to suspend § 925(c)'s relief procedure because it was concerned that dangerous felons were regaining their firearms privileges and because it believed that the resources allocated to investigating felons' applications would be better used to fight crime. The House Appropriations Committee noted:

> Under the relief procedure, ATF officials are required to guess whether a convicted felon . . . can be entrusted with a firearm. After ATF agents spend many hours investigating a particular

22. Our concurring colleague agrees that the appropriations ban is "irreconcilable" with § 925(c)'s jurisdictional grant, but criticizes, *inter alia*, our reliance on legislative history. We would reach the same result even if no Member of Congress uttered a word about his intent. That said, the legislative history confirms Congress's intent to suspend § 925(c)'s jurisdictional grant and undermines whatever slight persuasive value *Bean* has.

> applicant for relief, there is no way to know with any certainty whether the applicant is still a danger to public safety. Needless to say, it is a very difficult task. Thus, officials are now forced to make these decisions knowing that a mistake could have devastating consequences for innocent citizens.
>
> Thus, the Committee believes that the $3.75 million and the 40 man-years annually spent investigating and acting upon these applications for relief would be better utilized by ATF in fighting violent crime. Therefore, the Committee has included language which states that no appropriated funds be used to investigate or act upon applications for relief from Federal firearms disabilities.

H.R. Rep. 102-618, at 14 (1992). Similarly, the Senate Appropriations Committee stated:

> Under the relief procedure, ATF officials are required to determine whether a convicted felon, including persons convicted of violent felonies or serious drug offenses, can be entrusted with a firearm. After ATF agents spend many hours investigating a particular applicant they must determine whether or not that applicant is still a danger to public safety. This is a very difficult and subjective task which could have devastating consequences for innocent citizens if the wrong decision is made. The Committee believes that the approximately 40 man-years spent annually to

> investigate and act upon these investigations and applications would be better utilized to crack down on violent crime. Therefore, the Committee has included language in the bill which prohibits the use of funds for ATF to investigate and act upon applications for relief from Federal firearms disabilities. Under current policy, States have authority to make these determinations and the Committee believes this is properly where the responsibility ought to rest. The Committee expects ATF to redeploy the positions and funding presently supporting firearms disability relief to the Armed Career Criminal program.

S. Rep. 102-353, at 19-20 (1992).

At the same time, not a single Member of Congress suggested that the appropriations ban would give courts the authority to evaluate § 925(c) applications in the first instance. *McHugh*, 220 F.3d at 60. Instead, individual Members echoed the Appropriations Committees' concern about restoring felons' firearms privileges. For instance, Senator Chafee said:

> Dozens of convicted felons who have had their gun rights reinstated have been rearrested on new charges, including attempted murder, robbery, and child molestation.
>
> This program [§ 925(c)'s relief provision] just does not make any sense. At a time when gun violence is exacting terrible costs upon our society,

> it seems absolutely crystal clear to me that the government's time and money would be far better spent trying to keep guns out of the hands of convicted felons, not helping them regain access to firearms.
>
> I am pleased to note that the Appropriations Subcommittee[23] has come to this same conclusion, and has stipulated in the bill that no appropriated funds may be used to investigate or act upon applications for relief from Federal firearms disabilities.

138 Cong. Rec. S13238 (1992). Likewise, Senator Lautenberg applauded the decision to suspend ATF from acting on § 925(c) applications: "Criminals granted relief have later been rearrested for crimes ranging from attempted murder to rape and kidnaping. . . . ATF agents have better things to do than conduct in-depth investigations on behalf of convicted felons. They should be out on the streets, pursuing criminals." *Id.* at S13241.

Nonetheless, the *Bean* panel claimed that Congress wanted courts to be able to restore felons' firearms privileges because it did not pass the SAFE bill, *Bean*, 253 F.3d at 237-39, which Senators Lautenberg and Simon introduced a few months before Congress decided to suspend ATF from acting on § 925(c) applications. 138 Cong. Rec. S2675 (1992).

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23. Though Senator Chafee referred to "the Appropriations Subcommittee," he probably meant "the Committee" because he made his remarks about one-and-a-half months after the Senate Appropriations Committee issued its report.

Appendix B

The SAFE bill would have eliminated § 925(c)'s relief provision for individuals and provided that corporations could not seek judicial review if ATF refused to restore their firearms privileges. *Id.* at S2676. In addition, it would have amended 18 U.S.C. § 921(a)(20) to provide that persons convicted of violent felonies cannot possess firearms even if the state in which they were convicted restores their civil rights.[24]

For several reasons, the SAFE bill's demise does not support the result in *Bean*. To begin with, the Supreme Court has consistently said that the legislative history of "a proposal that does not become law" is "a particularly dangerous ground" upon which to base an interpretation of an enacted law. *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650, 110 L. Ed. 2d 579, 110 S. Ct. 2668 (1990). The reason is that "[c]ongressional inaction lacks 'persuasive significance' because 'several equally tenable inferences' may be drawn from such inaction, 'including the inference that the existing legislation already incorporated the offered change.' " *Id.* (quoting *United States v. Wise*, 370 U.S. 405, 411, 8 L. Ed. 2d 590, 82 S. Ct. 1354 (1962)) (emphasis added).

Moreover, the sponsors of the failed SAFE bill successfully pushed for the appropriations ban and viewed the ban's suspension of § 925(c)'s relief provision as a step toward

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24. Section 921(a)(20) provides that a conviction "which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored" does not prevent a person from exercising firearms privileges unless the expungement, pardon, or restoration of civil rights expressly provides otherwise. 18 U.S.C. § 921(a)(20).

the repeal that they sought. For instance, Senator Lautenberg said of the appropriations ban: "I am very pleased that the bill before us includes a provision based on legislation that I introduced with Senator Simon. . . . I'm hopeful that, before long, we can take the next step, and make the change permanent." 138 Cong. Rec. S13241 (1992).[25] Indeed, the reasons that the House and Senate Appropriations Committees gave for imposing the appropriations ban mirror those offered by Senators Lautenberg and Simon in support of the SAFE bill. Compare 138 Cong. Rec. S2675 (1992) (statement of Sen. Lautenberg) ("Surely, someone who has demonstrated his or her willingness to commit a crime of violence should not be entrusted with highly dangerous, deadly weapons."), and *id.* at S2679 (statement of Sen. Simon) ("[T]axpayers are paying millions of dollars each year so that convicted felons may obtain firearms. In an age of increasing violent gun crimes, not to mention an ever widening budget deficit, that just doesn't make sense."), with S. Rep. No. 102-353 at 19 (1992) ("[Deciding which

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25. Senators Lautenberg and Simon made similar statements when they unsuccessfully reintroduced the SAFE bill in subsequent years. 141 Cong. Rec. S10570 (1995) (statement of Sen. Lautenberg) ("Senator Simon and I have been successful over the past three years in securing language in the Treasury, Postal Service and General Government Appropriations Bill that prohibits the use of appropriated funds to implement the ATF relief procedure with respect to firearms. However, a funding ban is merely a stop-gap measure for one fiscal year. This bill would eliminate the relief procedure permanently."); 139 Cong. Rec. S10850 (1993) (statement of Sen. Simon) ("Last year, Senator Lautenberg and I successfully included language in the Treasury, Postal and General Government appropriations bill to ensure that no money was spent by the Bureau in 1993 to rearm felons. However, a permanent ban is clearly needed.").

felons can safely carry firearms] is a very difficult and subjective task which could have devastating consequences for innocent citizens if the wrong decision is made."), and H.R. Rep. No. 102-618, at 14 (1992) ("[T]he Committee believes that the $3.75 million and the 40 man-years annually spent investigating and acting upon these applications for relief would be better utilized by ATF in fighting violent crime.").

In addition, *Bean* overlooked the fact that the appropriations ban is a temporary, compromise version of the portion of the SAFE bill that would have permanently prevented individual felons from regaining their firearms privileges. That Congress chose not to repeal § 925(c)'s relief provision does not mean that it did not intend to suspend it. Further, *Bean* neglected to mention that the SAFE bill raised federalism concerns that the appropriations ban did not, as it would have eliminated the states' ability to restore felons' firearms privileges. The Senate Appropriations Committee's report indicates that the SAFE bill failed to pass at least partially for this reason. *See* S. Rep. No. 102-353, at 20 (1992) ("Under current policy, States have authority to make these determinations and the Committee believes this is properly where the responsibility ought to rest.").

Moreover, the notion that Congress's failure to pass the SAFE bill illustrates that it wanted felons to be able to regain their firearms privileges is inconsistent with the legislative history of subsequent appropriations acts. In 1993, the Senate Appropriations Committee explained why it was continuing the appropriations ban in language virtually identical to that in its 1992 report; the only difference was that it noted that the appropriations ban would no longer apply to corporations.

S. Rep. No. 103-106, at 20 (1993). The House Appropriations Committee reiterated the reasons for the ban in 1995:

> Those who commit serious crimes forfeit many rights and those who commit felonies should not be allowed to have their right to own a firearm restored. We have learned sadly that too many of these felons whose gun ownership rights were restored went on to commit violent crimes with firearms. There is no reason to spend the Govern-ment's time or taxpayer's [sic] money to restore a convicted felon's right to own a firearm.

H.R. Rep. No. 104-183, at 15 (1995).

Shortly after we decided *Rice*, Senator Simon strongly criticized our decision. He emphasized that Congress wanted to suspend felons' ability to regain their firearms privileges, not to transfer to the courts the responsibility for reviewing § 925(c) applications:

> This misguided decision [referring to *Rice*] could flood the courts with felons seeking the restoration of their gun rights, effectively shifting from ATF to the courts the burden of considering these applications. Instead of wasting taxpayer money and the time of ATF agents[,] which could be much better spent on important law enforcement efforts . . . we would now be wasting court resources and distracting the courts from consideration of serious criminal cases.
>
> Fortunately, [*McGill*] found that congressional intent to prohibit any Federal relief — either through ATF or the courts — is clear. . . .

> Given this conflict in the circuit courts, we should clarify our original and sustaining intention. The goal of this provision has always been to prohibit convicted felons from getting their guns back — whether through ATF or the courts. It was never our intention to shift the burden to the courts.
>
> . . . . . It made no sense for ATF to take agents away from their important law enforcement work, and it makes even less sense for the courts, which have no experience or expertise in this area, to be burdened with this unnecessary job. Let me make this point perfectly clear: It was never our intent, nor is it now, for the courts to review a convicted felon's application for firearm privilege restoration.

142 Cong. Rec. S10320-21 (1996) (emphases added). In addition, Congress rejected some Members' efforts to undermine the appropriations ban. In 1995, the House Appropriations Committee reinstated the appropriations ban after one of its subcommittees voted to lift it. 141 Cong. Rec. S10572 (1995). The following year, Congress rejected a provision in the House version of the appropriations bill that would have supplemented district courts' jurisdiction so that they could review some § 925(c) applications *de novo*.[26]

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26. The House version included an amendment offered by Representative Obey — who opposed denying nonviolent felons the opportunity to regain their firearms privileges — that implicitly gave district courts jurisdiction to review some felons' applications. Representative Obey's amendment provided that "the inability of [ATF] to process or act upon [§ 925(c)] applications for felons convicted of a violent crime, firearms violations, or drug-related

(Cont'd)

Appendix B

Since 1996, Congress has not indicated why it retained the appropriations ban. However, there has been no adverse congressional reaction to the holdings in *McGill*, *Burtch*, *Owen*, *Saccacio*, *McHugh*, and *Mullis* that the appropriations ban does not allow district courts to review § 925(c) applications. If Congress wanted district courts to be able to restore felons' firearms privileges, these decisions should have prompted it to give them jurisdiction to do so.

In sum, the legislative history of the appropriations ban demonstrates that Congress wanted to suspend felons' ability to regain their firearms privileges under § 925(c). This history refutes the claim that Congress intended to give district courts jurisdiction to review ATF's congressionally mandated inability to restore felons' firearms privileges. *Mullis*, 230 F.3d at 220-21.

C. Policy Considerations

District courts' institutional limitations suggest that Congress could not have intended for the appropriations ban to

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crimes shall not be subject to judicial review," 142 Cong. Rec. H7635 (1996), which suggested that ATF's inability to act upon other criminals' applications was subject to judicial review. The Senate deleted this language, 142 Cong. Rec. S10141 (1996), and the final bill likewise did not give district courts new authority to review § 925(c) applications. H.R. Conf. Rept. No. 104-863, 142 Cong. Rec. H12007 (1996). Senators Lautenberg and Simon praised the Conference Committee for eliminating Representative Obey's amendment, which they said was inconsistent with the intent behind the appropriations ban. 142 Cong. Rec. S12164 (1996).

transfer to them the primary responsibility for determining whether to restore felons' firearm privileges. Evaluating a § 925(c) application requires a detailed investigation of the felon's background and recent conduct. 230 F.3d at 219. An effective investigation entails interviewing a wide array of people, including the felon, his family, his friends, the persons whom he lists as character references, members of the community where he lives, his current and former employers, his coworkers, and his former parole officers. *Id.*; *Bagdonas v. ATF*, 884 F. Supp. 1194, 1199 (N.D. Ill. 1995). Unlike ATF, courts possess neither the resources to conduct the requisite investigations nor the expertise to predict accurately which felons may carry guns without threatening the public's safety. *Mullis*, 230 F.3d at 220; *Owen*, 122 F.3d at 1354; *McGill*, 74 F.3d at 67.

Because courts "are without the tools necessary to conduct a systematic inquiry into an applicant's background," if they reviewed applications *de novo* they would be forced to rely primarily — if not exclusively — on information provided by the felon. *Mullis*, 230 F.3d at 219. As few felons would volunteer adverse information, the inquiry would be dangerously one-sided.[27] 230 F.3d at 219-20. Instead of being approved by ATF after a detailed investigation, felons'

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27. Pontarelli's petition illustrates the problem. The District Court heard only from witnesses he handpicked. Not surprisingly, these witnesses described Pontarelli as a nonviolent, morally upright, and productive member of the community, and said that his firearms privileges should be restored. While Pontarelli may have all these attributes, many other convicted felons do not. If we reaffirmed *Rice*, many more felons would regain their firearms privileges by making similarly one-sided presentations.

firearms privileges would be restored based on less, and less accurate, information. It is inconceivable that Congress — concerned that felons who regained their firearms privileges would commit violent crimes — would want to make the review process less reliable. *McGill*, 74 F.3d at 67.

Conclusion

Section 925(c) gives district courts jurisdiction to review applications only after a "denial" by ATF. The appropriations ban renders ATF unable to deny individual felons' applications, and thus effectively suspends § 925(c)'s jurisdictional grant. The legislative history of the appropriations ban confirms that Congress intended to prevent individual felons from regaining firearms privileges. Indeed, Congress could not have meant to confer new jurisdiction on the district courts to restore those privileges because district courts are incapable of predicting accurately which felons will misuse firearms. For these reasons, we overrule *Rice* and hold that the District Court lacked subject matter jurisdiction to review Pontarelli's application.

Appendix B

CONCUR BY:
McKEE

CONCUR:

McKEE, Circuit Judge concurring in the judgment:

I reluctantly concur in the judgment of the court. However, I write separately to voice my concerns over the more fundamental issue confronting us, and because I think this case is more momentous than the majority's analysis and the weight of the aggregate authority suggest.

I must agree that the tension between the legislative history of the appropriations ban on the Secretary's investigation mandated under 18 U.S.C. § 925(c) requires the result that the majority reaches.[1] However, I am not persuaded that Congress actually intended to repeal our subject matter jurisdiction under § 925(c). I do not doubt that "Congress wanted to suspend felons' ability to regain their firearms privileges under § 925(c)." *Maj. Op.* at 230. I am not nearly as certain that Congress actually suspended those privileges as opposed to merely having created a situation that leaves the jurisdictional grant in place while making its exercise absolutely impossible. In this latter situation, courts have no alternative but to conclude that subject matter jurisdiction under § 925(c) is an impossibility and the statute therefore becomes a dead letter. There is a fine but important distinction between concluding that

1. I will refer to the "Secretary" throughout as shorthand for the Secretary of the Treasury and his/her designee under 18 U.S.C. § 925(c). *See* 18 U.S.C. § 921(a)(18), 27 C.F.R. § 178.144(b), (d).

Congress intended to repeal a statute that confers subject matter jurisdiction, and concluding that it is impossible to exercise subject matter jurisdiction because the condition precedent to its exercise can never be satisfied although the grant of jurisdiction remains. Moreover, to the extent that the latter formulation of the issue necessarily implies the former, I write to express my concern that courts are being forced to repeal legislation that Congress has intentionally decided to leave alone.

The appropriations ban detailed by the majority is clearly in tension with the grant of subject matter jurisdiction in 18 U.S.C. § 925(c). However, I do not think that tension establishes an intent to repeal the statute. This tension may suggest that Congress intended to repeal our jurisdiction. However, as I discuss below, more than a suggestion of intent is required to imply a repeal. Moreover, to the extent that Congress may have intended an end to our jurisdiction while leaving § 925 in tact, I voice my concern that, given the separation of powers, our jurisprudential reach is exceeding our constitutional grasp.[2]

I.

At the outset, it is important to stress that repeals by implication are disfavored. *See Allen v. McCurry*, 449 U.S.

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2. Although I have reservations about the majority's analysis, I also wish to state that I disagree with the exhaustion analysis that formed the framework of our decision in *Rice v. United States*, 68 F.3d 702, 706-07 (3d Cir. 1995); and I am not persuaded by the analysis of the Court of Appeals for the Fifth Circuit in *Bean v. ATF*, 253 F.3d 234 (2001).

90, 99, 66 L. Ed. 2d 308, 101 S. Ct. 411 (1980). Nevertheless, as my colleagues note, an appropriations act can result in an implicit repeal of substantive law if Congress's intent to repeal the law is clear. *See Robertson v. Seattle Audubon Society*, 503 U.S. 429, 440, 118 L. Ed. 2d 73, 112 S. Ct. 1407 (1992); *United States v. Dickerson*, 310 U.S. 554, 555, 84 L. Ed. 1356, 60 S. Ct. 1034 (1940). *See Maj. Op.* at 6. However, courts must be even more reticent to imply a repeal of substantive legislation when the sole indicia of congressional intent is an appropriations act. The Supreme Court has stated:

> The doctrine disfavoring repeals by implication applies with full vigor when . . . the subsequent legislation is an appropriations measure. This is perhaps an understatement since it would be more accurate to say that the policy applies with even greater force when the claimed repeal rests solely on an appropriations act.

Tennessee Valley Authority v. Hill, 437 U.S. 153, 190, 57 L. Ed. 2d 117, 98 S. Ct. 2279 (1978) (emphasis and ellipses in original, citations omitted).[3]

The majority's analysis rests in large part upon comments of individual Representatives and Senators, and statements in various committee reports. Those comments and statements evidence understandable concern and indignation over a federal agency spending money to assist convicted

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3. For convenience, I will refer to *Tennessee Valley Authority v. Hill* as "*TVA*," and I will refer to the Tennessee Valley Authority, the petitioner in that case, as the "Authority."

felons in regaining firearm privileges. Such expressions may reflect congressional intent, but that does not necessarily follow. "[E]xpressions of committees dealing with requests for appropriations can not be equated with statutes enacted by Congress. . . ." *TVA*, 437 U.S. at 191. This is particularly true when the statements are made in the appropriations context. Moreover, *TVA* teaches that "we should be extremely hesitant to presume the general congressional awareness [of the issues involved] based only upon a few isolated statements in the thousands of pages of legislative documents." 437 U.S. at 192 (quoting *SEC v. Sloan*, 436 U.S. 103, 121, 56 L. Ed. 2d 148, 98 S. Ct. 1702 (1978) (internal quotation marks omitted)). Inasmuch as the text of § 925(c) still sets forth a mechanism whereby a convicted felon may file a request with the Secretary, I am reluctant to conclude that the "plain purpose," of the appropriations ban was for Congress to rescind subject matter jurisdiction under that statute.

> Members [of Congress] may differ sharply on the means for effectuating [their] intent, the final language of the legislation may reflect hard-fought compromises. Invocation of the 'plain purpose' of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent.

Bd. of Governors of Fed. Reserve Sys. v. Dimension Financial Corp., 474 U.S. 361, 374, 88 L. Ed. 2d 691, 106 S. Ct. 681 (1986).

Here, of course, the precise issue is not whether Congress thought it would be a good idea to prevent felons from regaining firearms privileges. Rather, the issue is whether Congress's failure to appropriate funds for the investigation mandated by § 925(c) was tantamount to rescinding subject matter jurisdiction of the federal courts even though the statute conferring that jurisdiction was neither amended nor formally repealed.

The Court's analysis in *TVA* counsels far more caution in resolving this paradox than is evident from the majority's analysis. Although a strong argument can be made to distinguish the holding in *TVA*, I believe the analysis of the appropriations acts at issue there, is more instructive than the majority's discussion here suggests.

TVA arose under the Endangered Species Act of 1973. That legislation authorizes the Secretary of the Interior to declare that a species is "endangered," and thereby list it for special protection. The species at issue was the "snail darter," a recently discovered member of the perch family. The only known snail darters lived in a portion of the Little Tennessee River that was soon to be completely inundated by the Tellico dam. That dam was nearing completion at a cost of over $100 million.

Congress had appropriated funds for the Tellico dam project every year since 1967. However, in 1972, a federal district court enjoined completion of the dam pending filing of an appropriate Environmental Impact Statement and that injunction remained in effect until late 1973 when that court approved the final Environmental Impact Statement and

allowed the project to proceed. A few months after the injunction was dissolved, the snail darter was discovered in the vicinity of the Tellico project and was shortly thereafter placed on the Endangered Species List. From there, this "previously unknown species of perch" took center stage in the attempt to stop construction of the dam. *TVA*, 437 U.S. at 159.

In court, the Authority argued that the Endangered Species Act was not intended to prohibit the completion of a project which had been authorized and funded by Congress and was substantially constructed before the Act had even been enacted. Meanwhile, the maneuvering over the snail darter's fate and the future of the dam had not gone unnoticed in Congress. After the Authority argued in court that Congress did not intend for the Endangered Species Act to apply in this situation, the House Committee on Appropriations went on record in a June 20, 1975 Report as recommending that an additional $29 million be appropriated for the Tellico dam project. The Report stated: "the Committee directs that the project should be completed as promptly as possible." 437 U.S. at 164 (emphasis in original). Consistent with that recommendation, Congress thereafter approved the Authority's budget including funds for completing the Tellico project. That budget was signed into law one month after the snail darter was listed as an endangered species.

After the budget was enacted into law, an association of biologists and a group of concerned citizens again went into court seeking to enjoin completion of the project. This time they argued that the project violated the Endangered Species Act by endangering the last known habitat of the snail darter.

Shortly thereafter, the House and Senate held appropriations hearings. Those hearings included a discussion of the Tellico budget and the controversy surrounding the project's completion. During those hearings, the Chairman of the Authority argued that the Endangered Species Act should not apply to the Tellico dam project because it was over 50 percent completed when the Act became effective and 70 to 80 percent complete when the snail darter was listed as endangered.

Meanwhile, the district court accepted the Authority's position in the ongoing litigation. The court refused to enjoin the project noting that a permanent injunction would mean that "some $53 million would be lost in nonrecoverable obligations, . . . a large portion of the $78 million already spent would be wasted . . . . [and also noting that] the Endangered Species Act was passed some seven years after construction of the dam commenced and that Congress had continued appropriations for Tellico, with full awareness of the snail darter problem." 437 U.S. at 1669. The district court reasoned that

> at some point in time a federal project becomes so near completion and so incapable of modification that a court of equity should not apply a statute enacted long after inception of the project to produce an unreasonable result. . . . Where there has been an irreversible and irretrievable commitment of resources by Congress to a project over a span of almost a decade, the Court should proceed with a great deal of circumspection.

Id. The district court also noted that the plaintiffs' position would create the "absurd result of requiring 'a court to halt impoundment of water behind a fully completed dam if an endangered species were discovered in the river on the day before such impoundment was scheduled to take place' ". 437 U.S. at 166-167 (emphasis added). The district court "[could] not conceive that Congress intended such a result[ ]" and refused an injunction. *Id.*

Only a couple of weeks after the district court refused the injunction, the Senate and House Appropriations Committees recommended approval of the full $9 million budget requested to continue work on the dam. The Report accompanying the legislation in the Senate stated:

> During subcommittee hearings, [the Authority] was questioned about the relationship between the Tellico project's completion and the 1975 listing of the snail darter . . . as an endangered species under the Endangered Species Act. . . . [The Authority] repeated its view that the Endangered Species Act did not prevent the completion of the Tellico project, which has been under construction for nearly a decade. The subcommittee brought this matter, as well as the recent U.S. District Court's decision upholding [the Authority's] decision to complete the project, to the attention of the full Committee. The Committee does not view the Endangered Species Act as prohibiting completion of the Tellico project at its advanced stage and directs that this project be completed as promptly as possible in the public interest.

Id. (emphasis in original). Thereafter, both Houses of Congress passed the Authority's budget including the requested funds for completion of the Tellico project, and that budget was signed into law.

However, the Court of Appeals for the Sixth Circuit subsequently reversed the district court's decision denying an injunction, and remanded the litigation to the district court with instructions that it issue an injunction that would remain in effect until Congress, "by appropriate legislation, exempts Tellico from compliance with the Act or the snail darter has been deleted from the list of endangered species or its critical habitat materially redefined." *Hill v. Tennessee Valley Authority*, 549 F.2d 1064, 1069 (6th Cir. 1977). The district court entered a permanent injunction on remand pursuant to that direction.

Members of the Authority's Board thereafter appeared before subcommittees of both the House and Senate Appropriations Committees and testified in support of continued appropriations for completion of the project despite that injunction. Both Appropriations Committees subsequently recommended that Congress appropriate the full amount needed to complete the Tellico dam. The House Appropriations Committee stated in its June 2, 1977 Report:

> It is the Committee's view that the Endangered Species Act was not intended to halt projects such as these in their advanced stage of completion, and [the Committee] strongly recommends that these projects not be stopped because of misuse of the Act.

TVA, 437 U.S. at 170 (emphasis and brackets in original). The Senate Appropriations Committee took a similarly strong stand. Its Report stated:

> This committee has not viewed the Endangered Species Act as preventing the completion and use of these projects which were well under way at the time the affected species were listed as endangered. If the act has such an effect which is contrary to the Committee's understanding of the intent of Congress in enacting the Endangered Species Act, funds should be appropriated to allow these projects to be completed and their benefits realized in the public interest, the Endangered Species Act notwithstanding.

437 U.S. at 171 (emphasis in original). Both Houses of Congress approved the Authority's budget, and a budget including funds to complete the Tellico project was subsequently signed into law.[4]

The primary issue facing the Supreme Court on appeal from the court of appeals' decision granting an injunction was whether Congress's continued funding of the project under these unique circumstances implied the repeal or amendment of the Endangered Species Act as applied to the Tellico project. In resolving that question, the Court accepted the proposition that completion of the nearly completed dam would "either eradicate the known population of snail darters or destroy their 'critical habitat.' " 437 U.S. at 171. As noted

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4. The Authority's budget also included funds for relocating the snail darter as that was an option that was being considered.

above, the Court first reiterated that the doctrine disfavoring repeals by implication "applies with even greater force when the claimed repeal rests solely on an Appropriations Act." 437 U.S. at 190, (emphasis in original). The Court further observed that the appropriations legislation that Congress approved for the project did not specifically state that the Tellico project was to be completed "irrespective of the requirements of the Endangered Species Act." 437 U.S. at 189. The Court therefore expressed great reluctance to glean a congressional intent from statements in the Appropriations Committee Reports, even though those statements purported to convey the will of Congress. 437 U.S. at 191. The Court was "urged to view the Endangered Species Act reasonably, and hence shape a remedy that accords with some modicum of common sense and public weal." 437 U.S. at 194 (internal quotation marks omitted). The Court refused, and responded by asking: "is that our function?" *Id.* The same question might well be posed here. *See Bd. of Governors of the Fed. Reserve Sys. v. Dimension Financial Corp.*, 474 U.S. 361, 374 n.7, 88 L. Ed. 2d 691, 106 S. Ct. 681 (1986) (Congress can best resolve "anomalies" resulting from "the process of effectuating congressional intent.").

There are, of course, real differences between inferring congressional intent from a refusal to appropriate funds and inferring congressional intent from an affirmative appropriation of funding. *See TVA*, 437 U.S. at 190. Thus, my colleagues' attempt to distinguish *TVA* from the circumstances surrounding the instant inquiry has some merit. Nevertheless, I find it difficult to completely reconcile our analysis with that of the Court in *TVA*.

Appendix B

18 U.S.C. § 925(c) still provides that:

> a person who is prohibited from possessing . . . firearms . . . may make application to the Secretary for relief from the disabilities imposed by Federal Laws with respect to the acquisition . . . for possession of firearms, and the Secretary may grant such relief if it is established . . . that the circumstances regarding the disability . . . are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest.

Accordingly, persons seeking relief from the federal firearms-disability can still petition the Secretary for relief from that disability under § 925(c). No one suggests that Congress repealed that portion of the statute. Rather, Congress has placed the applicant as well as the courts in a Catch 22 reminiscent of a Kafka novel.

Similarly, I can not as easily ignore Congress's failure to enact the Stop Arming Felons Act ("the SAFE bill") that was introduced in 1992, as the majority; nor am I as persuaded by the statements of various Representatives and Senators supporting the SAFE legislation as my colleagues. *See Maj. Op.* at 21-24. "Considering these statements in context, . . . it is evident that they represent only the personal views of these legislators. . . ." *TVA*, 437 U.S. at 193. My colleagues note that the defeat of the SAFE-bill and the subsequent enactment of the appropriations ban was a political compromise that allowed the appropriations ban to continue

on a temporary basis with some Representatives and Senators hoping it would become permanent. *See Maj. Op.* at 12-13. They suggest that *Bean v. ATF*, 253 F.3d 234, 239 (5th Cir. 2001), *reh'g en banc denied*, 273 F.3d 1105 (5th Cir. Aug. 21, 2001) (unpublished table decision), *cert. granted*, No. 01-704, 2002 WL 75667 (Jan. 22, 2002), "overlooked the fact that the appropriations ban is a temporary, compromise version of the portion of the SAFE bill that would have permanently prevented individual felons from regaining their firearms privileges." *Maj. Op.* at 22 (emphasis in original). However, that does not resolve the issue. When all is said and done, the text of § 925(c) still establishes a mechanism by which convicted felons can apply for removal of the disability, and judicial review is still woven into the text of the statute establishing that mechanism.[5]

Nor am I as comfortable with the notion that Congress can grant subject matter jurisdiction on the one hand while indefinitely suspending it on the other without altering the text of the jurisdictional statute. Congress has left the

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5. In this regard, the majority's reliance on statements in S.Rep. No. 102-353, at 20 (1992) is puzzling. There, the Senate Appropriations Committee Report states: "Under current policy, States have authority to make these determinations and the Committee believes this is properly where the responsibility ought to rest." *See Maj. Op.* at 22. That remark appears to refer not to the states' ability to exempt a convicted felon from the firearms disability by expunging his/her record, granting a pardon, or restoring his/her civil rights as is provided for under 18 U.S.C. § 921(a)(20). Rather, it suggests that the states can somehow perform the investigation called for under § 925(c). I do not understand how the Supremacy Clause would permit a state investigation to substitute for the Secretary's investigation under § 925(c) absent federal legislation to that effect.

mechanism of petitioning the Secretary under § 925(c) untouched. Congress had a specific opportunity to enact legislation that would remove the contradiction between the appropriations ban and the privilege of petitioning the Secretary, but it refused to do so. Now courts are forced to read the tea leaves sprinkled about the legislative history, and divine a resolution for the irreconcilable tension remaining between the continuing grant of a substantive privilege, and the failure to fund the mechanism for its realization. I agree that, given the nature of the statutory problem, we are unable to exercise subject matter jurisdiction under § 925(c).[6]

However, I join the judgment more because of that necessity than a reasoned belief that Congress itself intended to repeal a provision while leaving it intact. Rather, I believe that Congress has left it to the courts to repeal § 925(c), and I am reminded of the Supreme Court's inquiry in *TVA*: "is that our function?" *TVA*, 437 U.S. at 194.

I am not at all sure it is, and I find myself identifying with the circus hand that our colleague, Judge Aldisert, alluded to while dissenting in *United States v. Gibbs*, 813

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6. In a different context, agency inaction can constitute a "denial" triggering judicial review if the inaction has the same impact upon the "rights" of the applicant as no action. *Cutler v. Hayes, Jr.*, 260 U.S. App. D.C. 230, 818 F.2d 879, 898 n.154 (D.C. Cir. 1987). However, we then determine if the agency's inaction is unreasonable and seriously prejudicial. *Houseton v. Nimmo*, 670 F.2d 1375, 1378 (9th Cir. 1982). Inasmuch as the Secretary's inaction here results solely from the appropriations ban, there is no authority to conclude that it is unreasonable.

F.2d 596, 603 (3rd Cir. 1986) (Aldisert, J. dissenting). There, Judge Aldisert lamented that he "would not be the circus hand following the . . . elephant around the sawdust trail." Here, I fear that we have been handed the shovel, and invited to clean up after the elephant. I am joining my colleagues in taking up the shovel. Given the parameters of the jurisprudence so deftly set forth by the majority opinion, I do not think we have a choice. The Supreme Court has granted certiorari in *Bean*, and this anomaly will now finally be resolved there.

APPENDIX C — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA DATED MAY 4, 2001

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION 3:00-0906
(JUDGE KOSIK)

THEODORE L. SCHMIDT,

Plaintiff,

v.

UNITED STATES OF AMERICA, LAWRENCE H. SUMMERS, Secretary of the Treasury, THE UNITED STATES DEPARTMENT OF THE TREASURY, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS,

Defendants.

MEMORANDUM

Plaintiff filed the above-captioned complaint seeking reinstatement of firearm privileges in accordance with the provisions of 18 U.S.C. § 925(c). Presently before this court is the defendants' motion for judgment on the pleadings. For the reasons which follow, we will grant defendants' motion for judgment on the pleadings.

Appendix C

BACKGROUND[1]

Plaintiff became a Scranton police officer on November 30, 1990. Upon his certification as a police officer, plaintiff was assigned as a Patrolman to the Patrol Division of the Scranton Police Department. He served in the Patrol Division from 1991 until 1995, when he was certified as an accident reconstructionist and assigned to the Highway Unit of the Scranton Police Department.

Sometime in 1996, plaintiff became involved in an altercation with the person with whom he was co-habitating, Rose Maxwell, which resulted in his arrest. On September 6, 1996, plaintiff pled guilty to Simple Assault-Mutual Combatants. This offense is graded as a Misdemeanor 3 under the Pennsylvania Crimes Code. *See* 18 Pa.C.S. § 2701. On September 9, 1996, plaintiff was sentenced to one (1) year probation.

In 1996, sometime after plaintiff entered his guilty plea, Congress amended the Gun Control Act of 1968 to prohibit those convicted of "a misdemeanor crime of domestic violence" from possessing a firearm. 18 U.S.C. § 921(a)(33)(A). Prior to this amendment, only those convicted of felony crimes were prohibited from possessing firearms. As a result of the retroactive application of this amendment, plaintiff was relieved of his duty weapon, and assigned to office duties

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1. When evaluating the facts for a motion for judgment on the pleadings, we accept all material allegations of the complaint as true and construe all inferences in the light most favorable to the plaintiff. *See Society Hill Civic Association v. Harris*, 632 F.2d 1045, 1054 (3d Cir. 1980).

in the Highway Unit of the Scranton Police Department. Since that time, plaintiff's duties have been limited to accident investigations and clerical duties by the Scranton Police Chief.

On November 30, 1999, plaintiff submitted an application to the Secretary of the Treasury seeking relief from disability as set forth in 18 U.S.C. § 925(c). However, no action was taken on plaintiff's application due to the prohibition imposed on the agency by congressional appropriation measures. After waiting seven months for his application to be processed, plaintiff filed the instant action contending that he has met all of the statutory criteria for relief from disability under the Gun Control Act, but has been denied that statutorily prescribed remedy due to the agency's inability to process his application. Defendants filed an Answer and a Motion for Judgment on the Pleadings on August 30, 2000. (Doc. 11). A brief in support of their motion was filed on September 14, 2000. (Doc. 12). Plaintiff filed an opposition brief on September 27, 2000. (Doc. 15). Defendants filed a Reply brief on October 27, 2000. (Doc. 18). Finally, on December 1, 2000, plaintiff filed a Response to defendants' Reply. (Doc. 20).

We now consider defendants' Motion for Judgment on the Pleadings.

Appendix C

STANDARD OF REVIEW

When considering a motion for judgment on the pleadings under Rule 12(c), the court must accept all material allegations of the complaint as true and construe all inferences in the light most favorable to the non-moving party. *See Society Hill Civic Association v. Harris*, 632 F.2d 1045, 1054 (3d Cir. 1980). Judgment will not be granted "unless the movant clearly establishes that no material issue of fact remains to be resolved and that he is entitled to judgment as a matter of law." *Id.* It is with this standard in mind that we consider defendants' motion for judgment on the pleadings.

DISCUSSION

In 1996, Congress amended the Gun Control Act of 1968, by extending the prohibition imposed on felons from possessing, transporting, or receiving firearms to include those convicted of "misdemeanor crime[s] of domestic violence." 18 U.S.C. § 922(g)(9). Under the provisions of the original Act, as well as current Act, the Secretary of the Treasury is authorized to lift the firearms disability imposed under the Act if "it is established to [the Secretary's] satisfaction that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to the public safety and that the granting of the relief would not be contrary to the public interest." 18 U.S.C. § 925(c). The Secretary of the Treasury has delegated the authority to grant relief from the firearms disability to the Director of the ATF. *See* 27 C.F.R. § 178.144(b), (d). The Act also provides that any "person whose application for relief from

disabilities is denied by the Secretary may file a petition with the United States district court for the district in which he resides for a judicial review of such denial." 18 U.S.C. § 925(c).

Although the Act provides a procedure by which an applicant can seek to have the disability removed, Congress has expressly prohibited the ATF from using any appropriated funds to act on such applications. As a result, since 1992, those seeking removal of the disability have been unable to gain review by the ATF. The Court of Appeals for the Third Circuit addressed this problem for the first time in 1995. In *Rice v. United States*, 68 F.3d 702 (3d Cir. 1995), the Court held that a district court retains subject matter jurisdiction to consider a petition for relief from the federal firearms disability, even in the absence of exhaustion of administrative remedies. The Court clarified its holding in *Rice* five years later in *Palma v. United States*, 228 F.3d 323 (3d Cir. 2000). In *Palma*, the Court stated, "a showing of a 'potential for a miscarriage of justice' is the threshold showing which a convicted felon must make under *Rice* in order for the district court to permit the applicant to submit evidence of his or her fitness to have firearms privileges restored. Then, and only then, can the district court receive such evidence and consider it in determining whether the applicant satisfies the other requirements of § 925(c)-i.e., whether the applicant will not be likely to act in a manner dangerous to public safety and that the granting of relief would not be contrary to the public interest." *Id.* at 329. Further, this showing must "arise from the averments in the four corners of the petition." *Id.* at 330. Therefore, in order for plaintiff to proceed beyond defendants' motion for judgment on the pleadings, plaintiff must have made the requisite showing of a "potential miscarriage of

justice" in his petition. Only upon such a showing can we consider evidence that plaintiff meets the statutory grounds for removal of disability.

In their motion for judgment on the pleadings, defendants argue that plaintiff has failed to make an adequate showing of a "potential miscarriage of justice." They argue that although plaintiff's complaint contains averments which if supported go toward meeting the statutory requirements of removal of disability, plaintiff has failed to aver in his complaint facts pointing to a "potential miscarriage of justice." In his brief in response, plaintiff relies on two Eastern District of Pennsylvania cases, *Palma v. United States*, 48 F.Supp.2d 481 (E.D.Pa. 1999), and *Pontarelli v. United States Dept. of Treasury*, 1999 WL 715167 (E.D.Pa. 1999), which held that the "potential miscarriage of justice" threshold was met upon a showing that (1) the plaintiff meets the statutory requirement for such relief and (2) there is no way for the plaintiff to obtain the relief, due to the lack of Congressional funding. However, since plaintiff filed his opposition brief, the Third Circuit Court of Appeals reviewed the decision in *Palma*, and reversed. *Palma v. United States*, 228 F.3d 323 (3d Cir. 2000). In particular, the Court stated "it is not the absence of administrative relief that constitutes a 'miscarriage of justice.' Rather, the [plaintiff] must allege facts in his or her application for relief which 'indicate a potential for a miscarriage of justice,' if the petition is denied." *Id.* at 329. As such, it is clear that plaintiff cannot rely on the fact that administrative relief is unavailable to satisfy the "potential miscarriage of justice" threshold.

Recognizing this clarification by the Court in *Palma*, plaintiff argues in his Response that his Complaint alleges sufficient facts to meet the "potential miscarriage of justice" threshold. For the most part, plaintiff points to the averments contained in his Complaint pertaining to his reputation and character, and the unlikeliness that he would act in a manner dangerous to public safety. We believe that the Court of Appeals' decisions in both *Palma* and *Rice* make it clear that these averments only become relevant when determining whether plaintiff meets the statutory requirements for removal of disability. But as clarified by *Palma*, the court must first determine that there is an adequate showing of a "potential miscarriage of justice" before it considers evidence of the statutory requirements. As such, we believe plaintiff's averments that he meets the statutory requirements for relief, by themselves, fail to meet the threshold enunciated in *Rice* and *Palma*.[2]

Plaintiff also appears to argue that there is a "potential miscarriage of justice" if his petition is denied because plaintiff can better serve the community as a police officer if he can carry a gun. We find this argument unpersuasive. Plaintiff has continued to serve as a Scranton Police Officer since the firearm disability was imposed upon him. Although

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2. Although we do not believe plaintiff's averments that he meets the statutory requirements for relief go to the threshold question of "potential miscarriage of justice," even if we are to consider these averments relevant to the threshold question and in the light most favorable to plaintiff, we find they fall well short of meeting the threshold. In particular, these averments fall well short of the unusual set of facts in *Rice v. United States*, 1997 WL 48945 (E.D.Pa. 1997), a case in which the district court found the threshold to be met.

unable to carry a gun, plaintiff retains his position in the Highway Unit and performs accident investigation services and clerical work. From his own averments, it appears that plaintiff's ability as a police officer to serve the community remains intact. As such, we see no "potential miscarriage of justice" resulting from plaintiff's inability to carry a gun. Therefore, defendants' motion for judgment on the pleadings will be granted.

As a final matter, in his Response, plaintiff asks the court to grant leave to amend his Complaint if this court decides that *Palma* requires "fact based pleading more specific than that ordinarily required by the Federal Courts." We do not interpret *Palma* as requiring pleading more specific than the notice pleading requirements of the Federal Rules of Civil Procedure. *Palma* simply requires the complaint to contain factual averments sufficient to find a "potential miscarriage of justice." As discussed above, plaintiff has simply failed to do so. Thus, plaintiff's motion for leave to amend his complaint will be denied.

CONCLUSION

For the reasons stated above, we will grant defendants' motion for judgment on the pleadings. We will also deny plaintiff's motion for leave to amend his complaint. An appropriate Order is attached.

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION 3:00-0906
(JUDGE KOSIK)

THEODORE L. SCHMIDT,

Plaintiff,

v.

UNITED STATES OF AMERICA, LAWRENCE H. SUMMERS, Secretary of the Treasury, THE UNITED STATES DEPARTMENT OF THE TREASURY, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS,

Defendants.

ORDER

AND NOW, this 4th day of May, 2001, IT IS HEREBY ORDERED THAT:

[1] defendants' motion for judgment on the pleadings (Doc. 8) is granted;

[2] plaintiff's motion for leave to amend his Complaint (Doc. 20) is denied; and

[3] the Clerk of Court is directed to close the case.

s/ Edwin M. Kosik
Edwin M. Kosik
United States District Judge

APPENDIX D — RELEVANT STATUTES

18 U.S.C.S. § 921

§ 921. Definitions

(a) As used in this chapter [18 USCS §§ 921 et seq.] —

* * *

(33)(A) Except as provided in subparagraph (C), the term "misdemeanor crime of domestic violence" means an offense that —

(i) is a misdemeanor under Federal or State law; and

(ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

Appendix D

* * * *

18 U.S.C.S. § 922

§ 922. Unlawful acts

* * *

(g) It shall be unlawful for any person —

* * *

(9) who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

* * * *

Appendix D

18 U.S.C.S. § 925

* * *

(c) A person who is prohibited from possessing, shipping, transporting, or receiving firearms or ammunition may make application to the Secretary for relief from the disabilities imposed by Federal laws with respect to the acquisition, receipt, transfer, shipment, transportation, or possession of firearms, and the Secretary may grant such relief if it is established to his satisfaction that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest. Any person whose application for relief from disabilities is denied by the Secretary may file a petition with the United States district court for the district in which he resides for a judicial review of such denial. The court may in its discretion admit additional evidence where failure to do so would result in a miscarriage of justice. A licensed importer, licensed manufacturer, licensed dealer, or licensed collector conducting operations under this chapter [18 USCS §§ 921 et seq.], who makes application for relief from the disabilities incurred under this chapter [18 USCS §§ 921 et seq.], shall not be barred by such disability, from further operations under his license pending final action

on an application for relief filed pursuant to this section. Whenever the Secretary grants relief to any person pursuant to this section he shall promptly publish in the Federal Register notice of such action, together with the reasons therefore.

* * * *